

Foundoulakis v Kalatizadeh

2023 NY Slip Op 32865(U)

August 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 513674/2020

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

STEVEN FOUNDOULAKIS,

Plaintiff,

-against-

NAVID KALATIZADEH and EXCELLENT LIMO CORP.,

Defendants.

DECISION/ORDER

**Index No. 513674/2020
Motion Seq. No. 3
Date Submitted:
6/22/2023**

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>34-43</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>46-53</u>
Reply Affirmation.....	<u>54</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising from an automobile accident that occurred on May 6, 2020 in Brooklyn, New York. Plaintiff was driving on 74th Street when his vehicle was hit by defendants' vehicle at the intersection with 19th Avenue. Plaintiff testified that defendant driver did not stop at the stop sign and hit his car on the passenger side, near the front tire. The plaintiff declined an ambulance at the scene and instead waited for a tow truck for his car. He subsequently sought medical treatment.

In his bill of particulars, the plaintiff claims that, as a result of the accident, he sustained injuries to his cervical and lumbar spine, and to his left wrist. At the time of the accident, the plaintiff was approximately 56 years old.

Defendants contend that they are entitled to summary judgment dismissing the

complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and an affirmed IME report from an orthopedist.

Dr. Arnold T. Berman, an orthopedist, examined plaintiff on October 28, 2021, on behalf of the defendants. This was one and a half years after the accident. Dr. Berman states that he reviewed a list of four of plaintiff's medical records and his bill of particulars. At the time of the exam, Dr. Berman states that "[t]he claimant's current complaints are lower back hurts when bending. He stated like stabbing in the lower back. He has daily low back pain, with numbness in his right thigh but the pain does not travel to his feet. He has pain when turning over. He also complains of neck and thumb pain." He tested plaintiff's range of motion with a goniometer, using "normal ranges of motion are as per the American Medical Association 'Guidelines to the Evaluation of Permanent Impairment' Fifth Edition, and reports that plaintiff had normal ranges of motion in his cervical, thoracic and lumbar spine, with no tenderness or spasm. Dr. Berman reports that all related tests were negative. However, plaintiff reported experiencing pain during the straight leg raising test and when he was asked to squat.

Plaintiff did not claim that he injured his shoulder, but Dr. Berman tested both shoulders, with normal results. Dr. Berman tested the range of motion in both of plaintiff's wrists, and reports completely normal results. Dr. Berman tested the range of motion in both of plaintiff's hands as well. He found normal ranges of motion. Dr. Berman also reports that all related tests were negative. However, he states "there was left thumb pain on range of motion." He had "tenderness at the base of the thumb and pain at the CMC joint on the

left base of thumb.” There is no mention in either the bill of particulars or the supplemental bill of particulars [Docs 38 and 39] of an injury to a finger. Dr. Berman states, with regard to the thumb, that “Left wrist and thumb MRI report findings of a TFCC tear and an oblique tear of the basilar thumb joint which are secondary to repetitive work as a carpenter for many years and not this injury. A left wrist cortisone/xylocaine injection was done for preexisting degenerative disease- osteoarthritis.”

The doctor concludes that plaintiff’s cervical spine “sprain/strain,” thoracic spine “sprain/strain,” and lumbar spine “sprain/strain” have “resolved with no residuals.” He states plaintiff’s left wrist “sprain/strain” has resolved. Dr. Berman then, under a heading “discussion” says “[b]ased on my exam and review of the submitted medical records, Mr. Foundoulakis sustained the above-mentioned strain/sprain injuries which are now resolved with no clinical residuals. There were no objective findings on examination. There was no radiculopathy noted on examination. There was no focal strength or sensorimotor deficits. The exam of the cervical and lumbar spine demonstrated full range of motion. There is no clinical correlation of the MRI reports with the normal physical exam. There was no aggravation to age-related, multilevel, preexisting MRI findings of degenerative disease - osteoarthritis, foraminal stenosis, facet hypertrophy, discogenic disease, disc herniation and bulging discs with findings of the lumbar spine at L2-S1, of the cervical spine at C4-T1 and of the thoracic spine at T1-T3. Spinal injections for the cervical and lumbar spine were administered. No spinal surgery of the cervical or lumbar spine was done. All findings on MRI are chronic with no acute injury. These radiological report findings could not have been caused by this single motor vehicle accident. The subjective complaints were not supported by the objective findings on the physical exam.

There is no loss of bodily function. The exam of the left wrist demonstrated full range of motion with some mild tenderness at the base of the left thumb. The MRI report revealed findings of a TFCC tear and oblique tear of basilar thumb joint are secondary to many years as a carpenter. There was no atrophy of the upper extremities indicating normal usage. Grip and pinch testing demonstrated normal strength. Hand grip tested manually was strong bilaterally. Mr. Foundoulakis can participate in all activities of daily living. He can work without restrictions. He has not worked since October 2019. He did not sustain any permanent injury or disability.”

Defendants contend that their medical evidence, combined with plaintiff’s testimony at his EBT, eliminate all categories of injury in the statute. Plaintiff testified at his EBT that he had been employed as a carpenter for many years, and that he was a member of the carpenters’ union. At the time of the accident, he had been out of work for two or three months [Doc 40 Page 56]. He seems to attribute this to the Covid-10 Pandemic, saying “everything was shut down” [*id.*]. Plaintiff testified that he went three times a week for physical therapy, which was reduced to two times a week, then no-fault cut him off after four months and he stopped treating. He said he saw a Dr. Ashley Marcus at Precision Care, who oversaw his physical therapy. She administered injections for pain, and told him he had herniated discs in his neck and back. The deposition was held on June 22, 2021. At that time, plaintiff had not returned to work. Plaintiff testified that there was nothing that he has completely stopped doing because of his injuries [*id.* Page 75], and that he was never told by a doctor that he “shouldn’t do certain things.” He was asked if there was anything that he used to do before the accident that he still does, but less frequently, and he said gardening, sweeping and carrying groceries can be painful [*id.* Page 76]. He is awakened

by pain when he moves during sleep. Finally, he was asked if he was confined to his home after the accident due to pain, and he said that he was home in pain for “about a month” [*id.* Page 79].

Defendants argue that this testimony rules out the plaintiff’s claim with regard to the 90/180-day category of injury. Specifically, counsel avers that “it is evident that Plaintiff cannot establish the ninth element of Section 5102(d), as there has been no medically determined injury or impairment which prevented plaintiff from performing substantially all of his usual and customary daily activities for at least ninety of the first one hundred eighty days immediately following the accident, nor has there been any showing of any objective evidence of same. Given that the ninth element has not been established, and that none of the first eight elements have been established, it is clear that summary judgment in this case is warranted” [Doc 35 ¶29].

The court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment and have shifted the burden of proof to the plaintiff (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 956-957 [1992]). On the issue of causation, Dr. Berman offers no opinion, solely stating that plaintiff’s “sprains/strains” have resolved. If a defendant’s expert concedes that the alleged injuries were caused by the accident, the burden of proof does not shift to the plaintiff (see *Novembre v Punnoose*, 211 AD3d 961 [2d Dept 2022]). Dr. Berman has not done so here. In fact, defendants’ counsel argues that causation is an issue in this case, as “evidence of a bulging or herniated disc alone does not constitute serious physical injury. It is also required that the evidence shows causation between the accident and the injury and a significant limitation arising from the injury suffered.” [Doc 35 ¶18]. Counsel concludes that

“since Plaintiff failed to provide any evidence that the injuries he claimed to have sustained are causally related to the subject accident Defendant's motion for summary judgment should be granted” [Doc 35 ¶33].

In opposition to the motion, the plaintiff submits an affirmation of counsel and a number of exhibits which the court will now review.

The first item is at Document 49, and is stated to be photos of the vehicles after the accident. They were not submitted in admissible form and could not be considered. While plaintiff testified at his deposition that he took photos at the scene, they were not shown to him at the EBT so he could authenticate them. Nor is there any affidavit accompanying the photos.

The next item [Doc 50] is a letter from Dr. Marcus dated July 21, 2020, which is addressed “to whom it may concern” which states that “I feel that Steve Foundoulakis cannot currently work, because it is not safe for him to bend, twist, climb, or lift anything more than 10 pounds. I am recommending that he discontinue work for at least 6 months due to his injuries.” It is not in admissible form, and in light of the affirmation she provides at Document 51, need not be considered by the court to determine this motion.

The next item [Doc 51] is an affirmation from plaintiff's treating doctor, Dr. Ashley Marcus, which was prepared after a follow-up visit on February 15, 2023. She states that he first came to her office on June 1, 2020, about three weeks after the accident and during the beginning of the Covid-19 Pandemic. Dr. Marcus summarizes the initial visit as follows: “stiffness and pain in his left wrist, stiffness and pain in the neck, and stiffness and pain in the lower back. He denied any prior history of injury or trauma to the neck, lower back or left wrist prior to the motor vehicle accident. He stated his pain was mostly aching, with

occasional sharp pains, rated as 5/10 on average and 8/10 at maximum. He stated his pain was worsened when he tried to lift something heavy. Mr. Foundoulakis stated he normally he lifts heavy objects routinely at work, as he is a carpenter. He stated he has not worked since the accident and did not feel he would be able to return in his current condition. He also complained of difficulty gripping objects, and difficulty turning his head. He stated he was in constant pain. He noted radiating pain into the right buttock and left thumb. He had taken Tylenol with some benefit. He was given a lumbar trigger point injection for the pain, which contained lidocaine and Kenalog. I ordered medications for pain, including Lidocaine patches, cyclobenzaprine, and meloxicam, EMG testing for the upper and lower limbs, MRI Lumbar, MRI Cervical, X-ray of the left wrist, a thumb spica splint, and physical therapy." At the next visit, he was given a cortisone injection into the left wrist and at his next visit, 7/10/20, she reviewed the MRI results. He was "given a trigger point into the neck muscles." She recommended EMG testing.

On 7/16/20, plaintiff returned for a follow-up, and Dr. Marcus reports "He stated the neck trigger point injection did not give him significant pain relief. He stated the neck pain was radiating into the left thumb, with numbness and tingling. He also complained of low back pain radiating to the right lower limb. He also complained of left wrist pain with associated difficulty gripping. Pain rated at 7-8/10. Given the continued severity of the neck pain, I recommended a cervical epidural steroid injection. The MRI of the left wrist showed severe osteoarthritis at basilar joint of thumb, radial subluxation of first metacarpal base, partial tear of anterior oblique ligament at basilar joint, small effusions at basilar and triscaphe joints, vertical tear of central disc of TFCC, as well as mild ECRL and ECRB tenosynovitis. I recommended surgical consultation for the left wrist with a hand specialist

given the ligament tears noted on the MRI, but Mr. Foundoulakis stated he did not wish to have surgery if possible.”

Plaintiff then had two Right C7, T1 cervical epidural steroid injections, one in July 2020 and one in August. A few weeks after the August injection, plaintiff’s “[r]ated neck pain as 8/10, stating it was radiating down the right upper limb.” He resumed physical therapy. In October of 2020, plaintiff told Dr. Marcus that his lower back pain was worse after bending down to pick something up, radiating down the left lower limb to the foot. He said the prescribed medications were helpful. I recommended that Mr. Foundoulakis continue physical therapy and also provided a surgical consultation for the left wrist pain.”

Plaintiff did not return to see Dr. Marcus until February 15, 2023, presumably to obtain an affirmation to oppose this motion. Dr. Marcus notes that plaintiff had not gone to the hand surgeon she had recommended for his left wrist. She notes his complaints as follows: “stating his low back pain was severe since a flare-up several days before, rating pain 10/10. He stated he continued to have neck and left wrist pain, rating each as 6/10 in severity. He stated the injections and therapy received in 2020 had been helpful in reducing the neck and low back pain, but that since that time the pain had gradually worsened again. Given the worsening of Mr. Foundoulakis’s pain in the lower back and neck, I recommended repeating MRI imaging and EMG testing.”

Dr. Marcus notes that plaintiff was still unemployed. She read various medical records, as well as the IME of Dr. Berman and plaintiff’s EBT transcript, according to her report. She conducted a physical exam of plaintiff. Dr. Marcus’ exam of his left wrist found significant restrictions in his range of motion, and “He was tender at the thenar eminence and anatomical snuffbox. He had decreased grip strength on the left side (4/5) and positive

Finkelstein's test." Dr. Marcus' exam of plaintiff's cervical spine found significant restrictions in his range of motion. Dr. Marcus' exam of plaintiff's lumbar spine also reports significant restrictions in his range of motion, with tenderness, and a positive straight leg raising test. Her diagnosis is: "Left wrist pain due to multiple ligament injuries; Lumbar radiculopathy due to multiple herniations; and Cervical radiculopathy due to multiple herniations."

Under the heading "discussion," Dr. Marcus opines that "Steve Foundoulakis is a 59 year old male who presented for injuries to the left wrist, neck, and lower back following a motor vehicle accident which occurred on May 8, 2020. He had no prior history of pain in the neck, lower back, or left wrist and no prior history of trauma to the neck, left wrist, or lower back. Unfortunately, Mr. Foundoulakis continues to suffer chronic daily pain because of the injuries that he sustained. He will require continued pain management services, including medications as needed, and physical therapy for exacerbation of symptoms. He will require additional radiographic imaging to monitor the progression of his symptoms, including MRIs of the cervical and lumbar spine. I also feel he will benefit from additional injections to his cervical and lumbar spine to reduce his symptoms, either epidural injections or possibly radiofrequency nerve ablations. Mr. Foundoulakis may also require surgical treatment of the ligament tears sustained to his left wrist. Mr. Foundoulakis reported inability to return to work because of the injuries sustained on May 6, 2020. His job as a carpenter required repetitive lifting, climbing, bending, kneeling, and the use of tools. I do not feel Mr. Foundoulakis can return to work given his injuries, as he cannot lift anything heavy due to his neck and back injuries, and frequent bending and lifting would flare up his pain. Mr. Foundoulakis also reported a change in his ability to perform activities of daily living,

reporting pain when doing household chores like cleaning, sweeping, yardwork, and grocery shopping. He continues to have difficulty sleeping.”

Dr. Marcus then comments on Dr. Berman’s IME report, stating “On Dr. Berman’s physical exam of Mr. Foundoulakis, he reports a completely normal physical examination of the neck and lower back. When I examined Mr. Foundoulakis in the office, he had positive findings such as a limited range of motion in the neck and lower back, weakness in the bilateral shoulders, weakness in the bilateral ankles, positive Spurling’s sign and positive SLR. My physical exam findings indicate real, organic anatomical dysfunction. These findings are consistent with the findings on MRI of the cervical and lumbar spine and the electrodiagnostic studies. In regards to the left wrist, I noted tenderness to palpation, mildly limited range of motion, and grip weakness. Dr. Berman recorded a fully normal examination, but did note on Jamar testing that the strength of the left wrist and thumb was significantly decreased compared to the opposite side. The findings on the MRI of the Left wrist showed multiple ligament injuries which explains Mr. Foundoulakis’ weakness and limited range of motion. Dr. Berman stated in his IME that Mr. Foundoulakis only sustained sprain/strain injuries from the May 8, 2020 motor vehicle accident, which had fully resolved with no residuals. He stated the MRI findings in the cervical and lumbar spine were likely just age-related degenerative disease. Disc herniations could certainly be the result of an impact injury, such as a motor vehicle accident. Mr. Foundoulakis had no prior history of complaints about neck or lower back pain. Additionally, Dr. Berman opines that Mr. Foundoulakis’ left wrist pain was due to many years working as a carpenter rather than the motor vehicle accident. While it is true that the MRI showed osteoarthritis of the thumb, there was also evidence of tearing of the anterior oblique ligament at basilar joint and the TFCC

ligament, which could have been caused by a physical trauma. Again, per Mr. Foundoulakis, he had no prior history of left wrist pain until the motor vehicle accident. Dr. Berman states in his report that Mr. Foundoulakis had normal grip and pinch testing, but in fact the graph in his note shows the left grip and pinch strength is reduced by approximately 50% compared to the unaffected side. It is in my medical opinion that the car accident that occurred on May 8, 2020 is responsible for the pain and suffering Mr. Foundoulakis is experiencing in his neck, lower back, and left wrist. The stress that occurred to Mr. Foundoulakis's spinal column at the time of the motor vehicle accident resulted in sudden forceful impact to Mr. Foundoulakis's spinal column, compressing his discs and causing them to bulge and/or herniation. Mr. Foundoulakis was found to have multilevel disc herniation in the cervical, thoracic, and lumbar spine on MRI imaging and had abnormal physical exam findings. Mr. Foundoulakis's left wrist injury was the result of the motor vehicle accident, either due to direct impact, sudden hyperextension or sudden hyperflexion, or steering-wheel related injuries (when the force of the collision is transmitted to the wrist if the driver is gripping the steering wheel at the time of the accident)."

Dr. Marcus concludes her report by stating that "[a]s a result of the motor vehicle accident that occurred on May 8, 2020 within a reasonable degree of medical certainty, Mr. Foundoulakis has sustained a permanent, partial, and significant loss of use of function of the lumbar spine, cervical spine, and left wrist. It is within a reasonable degree of medical certainty that the multiple cervical and lumbar disc herniations as well as the tears to the ligaments in the left wrist are the result of the motor vehicle accident that occurred on May 8, 2020."

The next item [Doc 52] is an almost unreadable affirmation from a Dr. Marc Silverman, dated 1/22/21. He states that he examined plaintiff “for an independent medical examination.” Presumably this was included as it found that plaintiff had injuries, as the one used by defendants in this motion was prepared by another IME doctor. However, it is hard to read and not necessary for the court’s determination of this motion.

The last exhibit [Document 53] includes an affirmation from the radiologist who read the plaintiff’s cervical spine MRI films, Harold M. Tice, MD, with a copy of the report. There is also an affirmation from the radiologist who read the plaintiff’s left wrist MRI films, Amy Liebeskind, MD, with a copy of the report. Following that is a certification of medical records completed by Ashley Marcus of Precision Care Medical P.C., followed by some 150 pages of treatment notes, a nerve conduction study report, and other items.

Based upon the foregoing, the court finds that the plaintiff has overcome the motion and sufficiently raised triable issues of fact regarding his claims of “a permanent consequential limitation of use of a body organ or member” and “a significant limitation of use of a body function or system”, so as to warrant denial of the defendants’ motions for summary judgment.

In conclusion, plaintiff’s treating doctor’s affirmed report is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a “serious” injury” as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). The report indicates significant, quantified restrictions in plaintiff’s range of motion, both contemporaneously with the accident and recently, and his doctor opines that plaintiff’s injuries were caused by the subject accident. Thus, he raises a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial and the denial of the motion.

Accordingly, it is **ORDERED** that the defendants' motion is denied.

This constitutes the decision and order of the court.

Dated: August 17, 2023

ENTER:



Hon. Debra Silber, J.S.C.